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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-693

GEORGE GORDON REYNOLDS and
WALTER A. MITCHELL,

Petitioners,

against

TEXAS GULF SULPHUR COMPANY and
CHARLES F. FOGARTY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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This brief is submitted in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit filed by George Gordon Reynolds and Walter A. Mitchell on November 22, 1971. The petition is addressed to the same decision of the Tenth Circuit that is before the Court upon petition for certiorari in Docket No. 71-421. Petitioners herein (respondents in No. 71-421) seek review of two aspects of the judgment below. These issues relate to (1) the exercise of discretion by the United States District Court for the District of Utah in refusing to declare the *Reynolds* action to be a class action for the *Texas Gulf Sulphur Company* litigation,

and (2) the denial of counsel fees and expenses to petitioners' attorneys.

In their petition in No. 71-421, respondents herein have demonstrated the importance of the fundamental issues of liability in this case. We do not deny that there are procedural issues under Fed. R. Civ. P. 23, as amended by this Court in 1966, which have not been decided by this Court. We do submit, however, that the peculiar procedural posture of the *Reynolds* case within the context of the whole *Texas Gulf Sulphur* litigation renders this case an unsuitable vehicle for consideration of the problems arising under Rule 23. Moreover, as demonstrated *infra*, several of petitioners' complaints relate not to the Utah proceeding, but to the conduct of the New York litigation, of which petitioners here have no standing to complain.

Questions Presented

1. Did the United States District Court for the District of Utah abuse its discretion by denying to this case the status of a class action under Rule 23(b)(3) when the *Texas Gulf* litigation was concentrated in the Southern District of New York, where over 50 similar suits including more than 32 purported class actions were pending, and this case was the only action pending in the federal courts apart from that coordinated litigation?

2. In the absence of any statutory authority, is a plaintiff in an action prosecuted under §10 (b) of the Securities Exchange Act who recovers damages for himself individually entitled additionally to counsel fees and reimbursements of expenses from the defendants?

Additional Federal Rule Involved

Federal Rule of Civil Procedure 23(c), not set forth by petitioners, provides in relevant portions as follows:

> "(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.
>
> "(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.
>
> "(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.
>
> "(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class."

* * *

Statement of Facts

Proper consideration of the issues posed by the petition herein requires an understanding of the position of this case within the context of the entire *Texas Gulf Sulphur* litigation. In the history of this complex and precedent-shattering litigation, petitioners Reynolds and Mitchell are late arrivals.

On April 16, 1964, Texas Gulf announced the discovery of a major ore body near Timmins, Ontario, Canada. Approximately one year later, on April 19, 1965, the Securities and Exchange Commission filed a complaint in the United States District Court for the Southern District of New York charging Texas Gulf with violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 when it promulgated a press release on April 12, 1964, commenting upon rumors regarding its exploration program. The SEC also charged that certain officers, directors and employees of the Company violated Rule 10b-5 in purchasing TGS stock with knowledge of undisclosed drilling results.*

In the first four months after the filing of the *SEC* suit, more than forty actions seeking private damage recovery were brought against Texas Gulf and various of its officers, directors and employees. A year after the *SEC* complaint had been filed, more than ninety private actions were pending.

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* We cannot accept petitioners' version of the underlying facts as set forth in their statement of the case (Pet., p. 5), but respectfully refer the Court to the petition in No. 71-421 for a description of those facts and issues.

Most of these actions were commenced in the United States District Court for the Southern District of New York where Texas Gulf has its executive offices and where most of the individual defendants worked. Thirty-two of the cases brought in that court in 1965 purported to be class actions. United States District Judge Dudley B. Bonsal was appointed to coordinate the proceedings in all of the private damage actions (including the alleged class actions).*

In addition to the New York cases, a number of cases were commenced in federal and state courts in other jurisdictions. Where possible, state cases were removed to federal courts, and pursuant to 28 U.S.C. §1404(a), cases pending in the federal courts of Connecticut, Illinois, California, Florida and Texas were transferred to the Southern District of New York. These cases were also assigned to Judge Bonsal for coordination.

By an order dated September 7, 1965, Judge Bonsal provided for an expedited discovery schedule in the *SEC* case, with the product of that discovery to be made available to all of the private plaintiffs. Both the SEC and Texas Gulf produced hundreds of documents, answered numerous interrogatories and requests for admissions, and took pre-trial depositions, all of which were made available to the attorneys in the private actions. In May of 1966, slightly more than a year after the complaint had

* Seventeen actions were commenced in the Supreme Court of the State of New York. Actions brought in several counties in New York state were transferred on defendants' motion to New York County (Manhattan) and consolidated before one especially appointed judge. He in turn directed that discovery in the New York state court cases be coordinated with the Southern District cases. All actions brought in other state courts were either removed and transferred or eventually dismissed.

been filed, trial was commenced in the *SEC* action. The trial lasted until June 21, 1966, and the product of that trial, exhibits and transcripts, was also made available to all of the private plaintiffs.

It is at this point in time that petitioner Reynolds came into the picture. His action was commenced on July 12, 1966, while the *SEC* case was *sub judice* before Judge Bonsal. Reynolds' case was not initiated as a class action, but sought only damages for his own sale of 500 shares of Texas Gulf stock. His was the 94th private action commenced against Texas Gulf Sulphur Company. As had been done with all previous cases brought outside New York, defendants moved on August 31, 1966 to have the *Reynolds* case transferred to the Southern District of New York so that it could be there consolidated with the other pending cases. These cases by then included at least 32 purported class actions, twenty of which claimed to represent persons who sold at the same time as alleged by Reynolds.*

The motion to transfer and coordinate the *Reynolds* case with the New York litigation was vigorously opposed. Reynolds emphasized the individual aspects of his case, such as his age and desire for a speedy trial, and his selection of Utah as a forum. There was no claim advanced at that time that he represented a class of thousands of sellers of Texas Gulf stock. The motion to transfer his

* That is, persons who sold after Texas Gulf's release of April 12, 1964 and before issuance of Texas Gulf's release of April 16, 1964. Mr. Reynolds alleged in his complaint that he placed an order to sell his TGS stock on April 15, 1964. Discovery and trial later revealed he sold on April 16, 1964, after the April 16 release had been issued and its contents communicated to his brokerage firm by the Merrill Lynch private wire and Dow-Jones Broad Tape.

individual case was denied by Judge Ritter, and Texas Gulf's petition for a writ of mandamus to require a transfer was also denied. *Texas Gulf Sulphur Company v. Ritter,* 371 F.2d 145 (10th Cir. 1967).

Thus the *Reynolds* case, alone among the 94 cases that had then been brought with respect to the Timmins discovery in the federal courts, remained outside the Southern District of New York. In the wake of the Tenth Circuit decision affirming the refusal to transfer, three more actions against Texas Gulf, including the *Mitchell* action, were also filed in the District of Utah, and consolidated for trial with *Reynolds.*

It was only after the denial by Judge Ritter of the transfer motion that Reynolds amended his complaint to allege that it was brought on behalf of a class of persons "similarly situated to" Reynolds.* On January 27, 1967 Reynolds moved pursuant to Rule 23 to have his action declared a class action. Following hearing of the motion, Judge Ritter entered an order finding that petitioner had failed to sustain the burden of producing facts to justify the determination that his action was a proper class action. The court's order noted the extent of the litigation in the Southern District of New York and that such actions had been assigned to a single judge for discovery and trial. The court held that:

> "If the various private suits are to be concentrated for trial in a single forum, they should be concentrated in the Southern District of New York and not in this District."

* Our references to petitioners in the discussion of the class action questions should be understood to refer only to the *Reynolds* case. The *Mitchell* case did not purport to be a class action.

Judge Ritter also noted that substantial difficulties would be encountered in attempting to manage the proposed class action from the District of Utah. Subsequently, on October 12, 1967, Judge Ritter dismissed the class allegations in the case of *Karlson* v. *Texas Gulf*, one of the subsequent actions brought in the District of Utah, with Reynolds' lawyer as counsel for the Karlsons.

On August 19, 1966, Judge Bonsal had ruled that Texas Gulf had not violated §10(b) of the Securities Exchange Act when it issued the release of April 12, 1964. The SEC appealed from that decision, and these appeals were argued before the Second Circuit in March of 1967. Not until approximately 18 months later, in August of 1968, did the Second Circuit announce its *en banc* determination. Meanwhile the *Reynolds* case and the three others pending in the District of Utah proceeded to trial, and plaintiffs in two actions in the Southern District of New York entitled *Cannon* v. *Texas Gulf* and *Green* v. *Texas Gulf* (subsequently consolidated and referred to as the *Cannon* case) moved on November 8, 1967, for a determination that their actions could be maintained as a class action under amended Rule 23. On November 27, 1967, this motion was adjourned *sine die* pending the outcome of the appeal in the *SEC* case. Thereafter, upon the reversal in part by the Second Circuit, plaintiffs in *Cannon* renewed their Rule 23 motion before Judge Bonsal and it was argued on October 30, 1968. The SEC filed a brief *amicus curiae* supporting the *Cannon* plaintiffs' motion.

Upon the hearing of the motion, Judge Bonsal indicated that a class action might not be appropriate in cases where management of a class action would entail substantial effort, expense and time, and where plaintiffs could not show

a substantial chance of recovery. This was the view expressed in then recent Southern District decisions, and the record in the *SEC* case did not contain any evidence of intentional wrongdoing which, the Second Circuit had indicated, was the predicate for any private recovery. Counsel for plaintiffs in eight of the cases before Judge Bonsal also appeared and argued against the maintenance of a class action at that point. In response, the moving parties requested further discovery. The District Court granted this request, and depositions were taken by the New York class action plaintiffs in December of 1968.

Thereafter Judge Bonsal, in an opinion dated March 20, 1969, based on intervening Second Circuit decisions that indicated that the possibility of success was not a factor to be considered in determining whether an action was a proper class action, conditionally granted the *Cannon* motion for a class action. (Rule 23(c)(1) provides that all class actions may be conditional). The class was defined to consist of all persons who sold Texas Gulf stock on April 13, 14, 15 and up until 10:55 A.M. E.S.T. on April 16, in alleged reliance upon Texas Gulf's press release of April 12, 1964. *Cannon* v. *Texas Gulf Sulphur Co.*, 47 F.R.D. 60 (S.D.N.Y. 1969). The 10:55 time was declared the cut-off point because it was then that the information concerning the second press release was received in every brokerage house in the country and was available to all buyers and sellers of TGS stock. After that time, the court felt, the questions of whether individual sellers had actual knowledge of information contained in the second press release were too varied to constitute common questions of law and fact. The common issues did not predominate over individ-

ual issues, as required by amended Rule 23(b)(3). See generally Judge Bonsal's opinion in *Cannon* v. *Texas Gulf Sulphur Co.*, 53 F.R.D. 216 (S.D.N.Y. 1971).

Prior to entry of the court's order defining the class, the class action plaintiffs proceeded with discovery through interrogatories and depositions in attempts to identify the class members. At the same time defendants brought on motions for summary judgment in all the private actions pending before Judge Bonsal in the Southern District, which motions were argued on June 12, 1969. The summary judgment motions were granted in part and denied in part in an opinion dated October 31, 1969. *Astor* v. *Texas Gulf Sulphur Co.*, 306 F. Supp. 1333 (S.D.N.Y. 1969). To the extent the motions were denied they nevertheless had the result of simplifying the issues. Texas Gulf, however, remained a defendant in the *Cannon* class action, and the formal order declaring that action to be a class action was signed on November 10, 1969.

The *Reynolds* case and three other cases had gone to trial before Judge Ritter in the District of Utah, sitting without a jury, on April 29 through May 2, 1968. Judge Ritter himself did not announce his decision in favor of the plaintiffs in three of the four cases until September 11, 1969, sixteen months after trial. On October 13, 1969, more than a month after the Utah District Court had rendered its decision on the merits in favor of Reynolds, petitioner sought again to have the *Reynolds* action declared a class action. (The *Karlson* case tried before Judge Ritter was also commenced as a class action and plaintiffs therein were represented by the same counsel who represented Reynolds. But after the decision for defendants in that case there

was no attempt made to declare it a class action.) At this time, there were approximately 90 actions pending in state and federal courts in New York, and *Cannon* v. *Texas Gulf* had been declared to be the appropriate class action representing alleged reliance sellers. Even so, Judge Ritter accepted lengthy briefs and heard oral argument from both sides, and also permitted a New York attorney whose case had not been declared to be the class action in the Southern District of New York to appear *amicus curiae* to urge that the *Reynolds* case be declared a class action. This, of course, took place after the court had announced its decision on the merits in favor of Reynolds. Judge Ritter denied the new motion in an opinion dated January 13, 1970, which refers to the earlier motions and decisions and reaffirms the earlier determination that if the suits were to be concentrated for trial in a single forum, that forum should be the Southern District of New York.

While Reynolds unsuccessfully appealed this ruling to the Tenth Circuit, plaintiffs in *Cannon* were involved in the long and arduous process of locating the members of the class so that they could be given individual notice. Following identification through computer print-out sheets produced by the New York Stock Clearing Corporation on a deposition in May of 1969, some 165 brokerage houses which handled purchases and sales of Texas Gulf stock were required to identify their customers, pursuant to notice and court order of December 29, 1969. The compilation of this information took many months and the difficulties were compounded by the reluctance of several brokerage houses to search their records. After two further orders of the court directed to the brokerage houses, dated June 5, 1970 and July 22, 1970, a mailing list was compiled

from the brokerage house records and from correspondence in the files of Texas Gulf, the SEC, and various private attorneys. This list was filed in the Southern District of New York on November 19, 1970. Notice was mailed to the more than 1600 persons so identified on or prior to November 30, 1970, and this notice provided that requests for exclusion from the class were to be filed by January 15, 1971. By this latter date, the *Cannon* plaintiffs had moved for consolidation of all separately brought claims alleging reliance upon the April 12, 1964 press release, and this procedure was carried out by an order dated February 19, 1971.

At the same time, discovery and other pre-trial procedures on the part of both plaintiffs and defendants were continuing. In addition, on September 3, 1970, plaintiffs in two cases* moved for summary judgment on two grounds: (1) that the evidence as a matter of law established liability of Texas Gulf to the class; (2) that defendants were collaterally estopped by virtue of the decision of the Utah District Court in the *Reynolds* case and of the Second Circuit Court of Appeals in the *SEC* case. That motion was argued before Judge Bonsal on September 14, 1970, and was denied in companion opinions rendered February 5, 1971. *Cannon* v. *Texas Gulf Sulphur Co.,* 323 F.Supp. 990 (S.D.N.Y. 1971) and *Fink* v. *Coates,* 323 F.Supp. 988 (S.D.N.Y. 1971). In denying collateral estoppel effect to the *Reynolds* judgment, Judge Bonsal noted that application of collateral estoppel was within the discretion of the

* The *Cannon* plaintiffs and the same New York plaintiffs who had appeared *amicus curiae* in the District Court of Utah after the decision there to urge that the *Reynolds* case be declared a class action.

court, set forth the factors militating against collateral estoppel, and pointed out that the Utah court had made "no specific findings of fact or conclusions of law with respect to the crucial issue of *scienter*, thus raising a 'reasonable doubt' as to what was decided" in that action. 323 F.Supp. at 990.

Having failed to obtain his goal of a class action in the District of Utah, petitioner Reynolds finally sought to intervene in the New York proceedings on January 15, 1971. Although he had steadfastly resisted any participation in the New York proceedings from the commencement of his lawsuit on July 12, 1966 until January 15, 1971, and notwithstanding that a favorable judgment had been entered on his claim, he filed a Notice of Appearance in the *Cannon* class action in New York, moved to intervene in the New York proceedings under Rule 24 of the Federal Rules, and further moved to have his counsel appointed lead counsel in the *Cannon* action. The New York District Court rejected the application to intervene on the ground that Reynolds had already recovered a judgment in Utah on the claim he sought to make in New York, and that in addition, he was not a member of the *Cannon* class, as he had sold his Texas Gulf stock after Texas Gulf's April 16 announcement had been published on the Dow-Jones Broad Tape. The court did allow, however, Mrs. Margaret E. Wright, also represented by petitioner's counsel, who fell within the *Cannon* class definition, to appear in the action pursuant to Rule 23(c)(2)(C). Counsel for the *Cannon* plaintiffs, who had participated in the New York proceedings for almost six years, who had discovered the identity of class members, and who had administered the giving

of notice to the class members, were declared lead counsel for the alleged reliance claimants.

In conjunction with his application to intervene in the New York action, Reynolds moved to expand the *Cannon* class definition to include sellers after 10:55 A.M. on April 16, 1964 such as himself. This motion and the similar motions of some New York plaintiffs were denied in an opinion dated June 8, 1971 (53 F.R.D. 216), as they had been denied on several occasions before when made by the *Cannon* plaintiffs (*e.g.*, notice of motion dated October 3, 1968; amended class action order noticed for settlement on November 10, 1969; notice of motion dated November 26, 1969), on grounds which included the lack of common questions of law or fact, the difficulty of giving notice, the difficulties of proving reliance, and the small number of persons selling during this period who had brought suit. No appeal was taken or sought to be taken from that decision.

It is correct, as petitioners state, that defendants moved against the class action status of the *Cannon* case on March 5, 1971. However, that motion was denied by the court, in an opinion dated March 30, 1971 (53 F.R.D. 221), and the *Cannon* case retains its class status. Subsequently, defendants moved by a notice of motion filed November 4, 1971, to strike class action allegations in the thirty-three other alleged class actions now pending in the Southern District. Those motions, which were granted in a memorandum decision filed on December 14, 1971, do not affect the class action status of the *Cannon* case. Reynolds' counsel (including his New York counsel) was given notice of the November 4 motion but did not appear nor submit any papers in opposition.

Thus, as matters now stand:

1. Mr. Reynolds has obtained a favorable judgment for himself individually, but it is not binding upon others;

2. The decision adverse to the plaintiff in the companion case in the District of Utah (*Karlson*) is similarly not binding upon others;

3. A class action is proceeding in the Southern District of New York, unaffected by the Utah litigation, as has been the case since its inception.

ARGUMENT

I

This action was inappropriate for class action treatment.

It was Rule 23 of the Federal Rules of Civil Procedure that petitioners sought to invoke in the United States District Court for the District of Utah. Yet conspicuously absent from the petition herein is any discussion of the elements of that Rule. Instead, petitioners preface the points in their petition with liberal quotations from Professors Moore, Chaffee and others, and essentially argue that absent persons would have fared better had their case, rather than another case, been declared the class action for the *Texas Gulf Sulphur* litigation.

All of the scholars quoted by petitioners were considering the problems posed by multiple claims and were discussing the "spurious" type of class action under former

Rule 23, and in some instances were proposing methods for coping with multiple claims. This Court and the Advisory Committee which recommended the amendment of Rule 23 in 1966 fully considered the writings of these scholars in arriving at the text of the rule which was ultimately promulgated. Quotations of discussions of general concepts, written long before amended Rule 23 came into existence, are of little assistance in evaluating the issues posed by the present petition.

This Court set forth in Rule 23 the elements to be considered by the District Courts in making determinations as to whether a particular case is to be prosecuted as a class action. The prerequisites to any class action are set forth in Rule 23(a), and if these prerequisites are present, the District Court is next required to determine whether or not the additional elements of one of the subdivisions of Rule 23(b) are present, in this type of case the elements of Rule 23(b)(3). Rule 23 further specifies the procedures to be followed by the District Courts in considering motions for class action treatment and in managing class actions.

The rulings of the District Court of Utah were completely in accord with Rule 23, and indeed, no other rulings could have been properly rendered under the Rule. We shall first consider the applicability of Rule 23 with respect to the various attempts by petitioners to invoke it. Thereafter we shall consider in the context of this litigation the other arguments advanced by petitioners.

A. The Rule 23 motions before trial

When Judge Ritter denied the defendants' motion to transfer the *Reynolds* case to the Southern District of New

York, it was the only one of more than 50 cases pending in the federal courts involving the Texas Gulf mineral discovery which had not been brought before Judge Bonsal in the Southern District of New York for coordinated discovery and trial. It was the only federal case pending outside the Southern District of New York when petitioner Reynolds amended his complaint and sought by motion of January 27, 1967 to declare his case a class action. Utah was hardly a "center" of the Texas Gulf litigation as petitions contend (Pet., p. 6).

Upon the motion, the District Court in Utah entered an order finding that:

> "plaintiff failed to sustain the burden of producing facts which would justify the determination by the court that the [Reynolds] action is a proper class action as required by Rule 23 of the Federal Rules of Civil Procedure, as amended."

Specific findings with respect to the factors mandated by this Court to be considered under Rule 23(b)(3) were made by the District Court.

Judge Ritter properly took notice of the extent and nature of the *Texas Gulf* litigation in denying the motion as directed by Rule 23(b)(3)(B).* Similarly, Judge Ritter specifically ruled upon the desirability or undesirability of concentrating the litigation of the claims in Utah, as directed by Rule 23(b)(3)(C). At argument, he noted the

* Reynolds' vigorous opposition to the earlier transfer motion had indicated his interest in controlling the prosecution of his individual action, and the number of other suits brought indicated the interest of others in prosecution of their separate actions. The District Court, however, made no express finding on this element mentioned in Rule 23(b)(3)(A).

impossible situation of having class suits proceeding in different jurisdictions with conceivably conflicting results and specifically found that:

> "numerous actions involving similar issues of fact and law have heretofore been filed and are now pending before the United States District Court in the Southern District of New York, 32 of which actions purport to be class actions."

He further found in accordance with the mandate of Rule 23(b)(3)(C):

> "That if the various private suits are to be concentrated for trial in a single forum, they should be concentrated in the Southern District of New York and not in this district [Utah]."

The District Court also addressed itself to Rule 23(b)(3)(D) and found that "substantial difficulties would be encountered in attempting to manage the proposed class action from this District".* The testimony before the court at the time this conclusion was made established that the stock transfer books of Texas Gulf were in New York City, that it would be necessary to go to the stock exchanges which are located in New York to determine the clearing house firms, and then go to the brokerage firms who were involved in trading Texas Gulf shares to determine for whom all of the various transactions were made. In addition, the defendants and the corporate records of Texas Gulf were located in New York and the *SEC* trial and all

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* Petitioners quote Judge Ritter's concern with managing a lawsuit involving persons who sold 691,000 shares of stock. Rule 23(b)(3)(D) requires the trial court to consider the difficulties likely to be encountered in the management of a class action, and Rule 23(b)(3) states that a class action is to be declared only if it is "superior to other available methods for the fair and efficient adjudication of the controversy."

the attendant discovery had there taken place. Thus, contrary to petitioners' suggestions that Judge Ritter failed to make necessary findings, the specific subdivisions of Rule 23(b)(3) were considered by him and findings made that the *Reynolds* case was not the proper case for class action treatment.

Denial of class action status to this case was correct.

B. The motion for class status after the decision in favor of petitioners was required to be denied by the explicit language of the Rule.

Petitioners also suggest that the District Court was in error in denying the motion to declare a class action after the court had announced in September of 1969 its decision in favor of petitioners. But Rule 23(c)(1) specifies the time when the District Court is to determine whether or not an action is to proceed as a class action, and it specifically prohibits the creation of a class action at that late point, after a decision has been rendered:

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended *before the decision on the merits.*" (Emphasis added.)

The District Court below followed the procedure specified in the Rule in entering its order on February 6, 1967, a little more than three months after the amended complaint containing class allegations was filed. This case was pre-tried and tried on the basis of its being an individual suit.

That was the posture of the case when a memorandum of the court's determination was filed September 11, 1969. This was the "decision on the merits,"* and after it was rendered, there was no procedural basis for the backdoor renewal of the class action motion on October 13, 1969, when petitioner Reynolds, aided by persons whose New York action had not been denominated as the class action, again sought to have Judge Ritter declare the *Reynolds* case a class action.

The Advisory Committee's Notes make it clear that one of the principal purposes of Rule 23 was to prevent "one-way" intervention after a decision on the merits, stating explicitly that "one-way intervention is excluded." 39 F.R.D. 106. Petitioner, however, points to the language in Rule 23(d) which provides for "Orders in conduct of Actions" and states that these orders "may be altered or amended as may be desirable from time to time". (Pet., p. 20) As the language of the Rule itself and the Advisory Committee's Notes indicate, the orders referred to are those necessary to the fair and efficient conduct of an action which has been determined, at least conditionally, to be a class action. That subdivision does not apply unless a class action has been properly declared. The suggestion by petitioners that the general language of subdivision (d) should prevail over the express language of subdivision (c) and the expressed intention of the revisers of the Rule is simply without merit.

* At one point in their brief petitioners suggest that their motion was made before the "decision on the merits" because it was "before entry of judgment" (Pet., p. 20). Elsewhere, petitioners acknowledge that the Utah District Court announced its opinion "resolving the merits" on October 17, 1969 (Pet., p. 6). The decision on the merits was announced even earlier, on September 11, 1969.

The motion to declare a class action after the decision on the merits should not, under the Rule, even have been entertained. The denial of class action status after the decision on the merits was correct.

C. The rulings below were required by the provisions and purposes of amended Rule 23.

The rulings below were clearly in accord with both the letter and spirit of Rule 23 as revised in 1966. Petitioners argue for different results, but rely upon inapposite authorities and misguided reasoning.

The issue before the District of Utah was not whether any class action at all was appropriate, but whether the *Reynolds* case should have been *the* class action. Petitioners argue that the "class" would be better served were the *Reynolds* case now to be declared *the* class action. This argument, of course, has the advantage of hindsight, since *Reynolds* has, as of this point, obtained a favorable judgment; but this fortuity cannot be used to bring about a result so contrary to the law, to sound policy, and to the purposes of the amended Rule. To the same arguments, the Tenth Circuit concluded that "the trial court has wisely exercised its discretion" (80a).

In discussing the issues, petitioners have so mixed together different types of class actions and the authorities applicable to the Rule prior to its amendment, that a totally distorted and indeed unintelligible legal discussion emerges. This fact is evidenced in several different aspects of petitioners' argument.

1. *The authorities under former Rule 23 do not provide a basis for now declaring the* Reynolds' *case to be a class action.*

For their argument that the *Reynolds* case should now be declared a class action on behalf of absent persons, and that such persons be given the benefit of the *Reynolds* judgment, petitioners cite *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356 (1921). That case is supposed authority for the proposition that the judgment in the *Reynolds* case includes the class although there has been no prior notice.* However, it is clear that the *Ben Hur* case did not involve a Rule 23(b)(3) type of case, or as it was then called, a "spurious" class action which was no more than a device for permissive joinder. Rather, the *Ben Hur* case was the so-called "true" class action now encompassed by Rule 23 (b)(1), and the case is so discussed in the Advisory Committee Notes (39 F.R.D. at 100). *Ben Hur* involved a claim of several parties with respect to a single fund, and its appropriateness for class status was based on the fact that any decision in that lawsuit would necessarily affect the interests of all other parties ("the class"). This Court there held that *res judicata* would apply in that type of case even without prior notice to the class.

In amended Rule 23(c)(3), which discusses formulation of judgments in all categories of class actions, the holding in the *Ben Hur* case is reaffirmed for that type of case. Thus, the first sentence of that subdivision states:

"The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or

* This question is not the same as whether the New York court should grant collateral estoppel effect to the *Reynolds* case in the actions pending there. In *Fink* v. *Coates*, 323 F. Supp. 988 (S.D. N.Y. 1971), the court exercised its discretion and denied such a motion.

not favorable to the class, shall include and describe those whom the court finds to be members of the class."

It is the second sentence of amended Rule 23(c)(3) which applies to the instant type of case—a case falling within subdivision (b)(3):

> "The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, *shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed*, and who have not requested exclusion, and whom the court finds to be members of the class." (Emphasis added.)

The *Ben Hur* case has no application here.* So, in the instant case, where no notice was given out, there would be no warrant for holding the judgment included others, just as there would be no warrant for holding that the judgment in the *Karlson* case precluded maintenance of actions by members of another purported class.**

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* Petitioners' citation to other authorities such as *Smith* v. *Swormstedt*, 16 How. [57 U.S.] 288 (1853) and RESTATEMENT, JUDGMENTS ¶86, Comment *h* (1942), are similarly inapposite. These authorities, all written long before the Rule 23 amendment in 1966, refer to true or hybrid class actions, not the spurious class action, or permissive joinder device, which as modified by amended Rule 23 in 1966, is involved in this case.

** The case of *Karlson* v. *Texas Gulf* was also brought in the District of Utah, and it too purported to be a class action. More than 2,000,000 shares of Texas Gulf stock were sold over the New York Stock Exchange by persons who, like Karlson, had not been informed of Texas Gulf's initial drill hole in Canada. Many of them have brought suits which are presently pending in the Southern District of New York. One can imagine the hue and cry which would arise if, after the adverse decision on the merits in the District of Utah, a class action had been declared and all of those persons were declared to have been barred by the Utah judgment. Respondents have never sought to bar persons with pending suits on the basis that the *Karlson* trial determined their rights. While petitioners' counsel claims he has litigated the rights of the class (Pet., p. 8), he now makes no such claim with respect to the *Karlson* case which he also commenced as a class action.

As the Advisory Committee states, one of the primary purposes of the amendment of Rule 23 was to prevent "one-way intervention" in so-called "spurious" class actions. The Advisory Committee stated that "under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or non-class action," and in the former case, the judgment, whether or not favorable, will include the class. While prior to the 1966 amendment certain courts and commentators were tolerant of one-way intervention, the Advisory Committee took a contrary stand, in line with equally impressive precedent. 39 F.R.D. at 105-106.

2. *The prosecution of simultaneous class actions would have been improper.*

Petitioners also suggest that simultaneous class actions should have been allowed to proceed in New York and Utah at the same time, and that if this had occurred, the "class" would now be rewarded with the fruits of Reynolds' victory. Both the factual and legal bases for this argument are unsound.

To support their argument that two actions on behalf of a class should proceed simultaneously, petitioners rely upon cases decided under former Rule 23, before its amendment in 1966. Petitioners again fail to appreciate the distinctions between the "spurious" class actions under old Rule 23 and the type of class action under Rule 23(b)(3) of the amended Rule. A spurious class action under former Rule 23 was a permissive joinder device (see, *e.g.*, 3 Moore, Federal Practice ¶¶23.10, 23.12 (2d ed. 1963)), and the judgment "would extend only to the parties including

intervenors", and "was supposed *not* to adjudicate the rights or liabilities of any person not a party." Advisory Committee Notes, 39 F.R.D. 98, 99. (Emphasis added.) Under the old Rule, notice did not go out to persons who did not appear, and non-parties in these spurious class suits were not bound by the judgment. Thus cases such as *Partridge* v. *Martin*, 102 F.2d 284, 288 (8th Cir.), *cert. denied*, 307 U.S. 644 (1939), explain that two class suits could co-exist because neither would render an adjudication binding on absent persons, as distinguished from the *Ben Hur* type case of a true class action.

However ,under amended Rule 23(b)(3), all members of the class must receive notice and be given the opportunity to exclude themselves from the action; persons who do not request exclusion are bound by the judgment, whether favorable or unfavorable. One of the primary purposes of the new Rule was to avoid a multiplicity of multi-party suits. To allow two such actions, with a duplication of the necessarily heavy burdens of administration and management, would only be destructive of the ends sought to be obtained by the Rule. Moreover, to have more than one class action, with notices to the same individuals from separate courts advising them that they were represented in two different actions on the same claim, would engender hopeless confusion and disrespect for the judicial process. The possibility of different results from different courts binding the same individual could compound the problem.

Petitioners also urge that the policy against multiple lawsuits and the philosophy behind the Multidistrict Litigation Act (28 U.S.C. §1407) suggest that the *Reynolds* case should be maintained as a class action. However, it

is not respondents but petitioners who have brought about multiple litigation in different forums in this case. As set out above, respondents made every effort to have all of the cases transferred to the most convenient forum, New York, and to have all the federal cases consolidated in the Southern District of New York. Petitioner resisted the motion to transfer his action to New York where it could have been coordinated with the pending litigation. Instead he sought to prosecute his own action. Moreover, his urging that two class actions should proceed separately is directly contrary to the likely result of any action by the Judicial Panel on Multidistrict Litigation.

Indeed, Rule 23 cannot prevent the existence of separate individual suits, if persons such as petitioner desire them. A class action cannot insure that there will be only one trial. Rule 23 provides the option to class members to exclude themselves from the class, and to prosecute their separate actions. This has occurred in the New York proceedings, and it is certainly possible that in every class action situation, individuals desiring to maintain their own suits may obtain a judgment before a class action, with its attendant notice and administration problems, can be concluded. It is the very fact that the *Reynolds* case was not a class action that enabled it to reach judgment before the declared class action. The entire purpose of the Rule would be subverted, if, as here, a party obtaining an individual verdict in his favor could thereafter convert it into a class action.

3. *Difficulties inherent in managing a class action inevitably entail time-consuming procedures.*

Petitioners assert that the lower courts have ignored procedures which could have significantly shortened the duration of this litigation. But the length of time consumed results from the fact that the *Cannon* case is a class action, not an individual suit, and as such involves complex administrative problems. In New York, after all parties awaited the Second Circuit decision in the *SEC* action, a great deal of time was expended in discovery proceedings of brokerage houses, receiving and compiling names of potential class members, preparing and mailing notices, answering responses, and coordinating numerous other cases with the class action for trial purposes. These problems, particularly in dealing with brokerage houses, would have been exacerbated and even more time would have been expended if a class action had gone forward in Utah, and if as Rule 23 requires, notices had been sent out from the District Court in Utah prior to trial.

Petitioners also intimate that respondents have engineered "interminable delays", citing in footnote 6 on page 7 of their petition, 15 reported opinions in the *Texas Gulf* litigation. As this Court should be apprised from the pending petitions in Nos. 71-327, 328, 346, 347 and 421, the issues raised by this litigation are of first impression. Five reported decisions are in the *SEC* case, four in the Utah cases (including the decision upon respondents' attempt to transfer the *Reynolds* case to New York), one in Illinois upon a transfer motion, and five decisions on procedural and substantive motions brought by both plaintiffs and defendants in the coordinated New York proceedings. The

"delay" includes the 18 months the Second Circuit held *sub judice* the SEC's appeal and the time necessary to conduct the extensive discovery to ascertain and notify the class. All things considered, the litigation has been expeditiously processed, and any delay is the inevitable consequence of mammoth, landmark proceedings.

But speed is not and should not be the sole or determinant factor in considering the problems posed by class actions. The Advisory Committee's approach was not that "judicial efficiency is considered paramount." (Pet., p. 16). The Advisory Committee has cautioned that Rule 23 is to be used "without sacrificing procedural fairness or bringing about other undesirable results." 39 F.R.D. at 103. The alternatives suggested by petitioners would achieve just the opposite effect from that intended by the drafters of the Rule.

D. Petitioners' forays outside their chosen forum.

1. The inapplicability of the Multidistrict Litigation Act.

Petitioners complain that their belated attempt to invoke the procedures of the Judicial Panel on Multidistrict Litigation were ignored by the Court of Appeals for the Tenth Circuit. (Pet., p. 21). In a footnote they acknowledge that there is a "conceptual problem" because 28 U.S.C. §1407 deals exclusively with pretrial proceedings. The problem exists because petitioners only sought to invoke that statute after pretrial proceedings had been completed, after a trial had been completed, and after an appeal to the Tenth Circuit had been fully briefed and argued.

Not only was petitioners' timing late, but also their plea was addressed to the wrong body. 28 U.S.C. §1407(c) provides that proceedings for the transfer of an action under this section can be initiated by the Judicial Panel on Multidistrict Litigation upon its own initiative or by "motion filed with the panel by a party in any action * * *." Petitioners filed no such motion with the Judicial Panel, and they can hardly complain of inaction by that body in their petition here.

2. *Petitioners' attempts to participate in the New York class action proceedings.*

It was not until 1971, four and one-half years after his complaint was filed, and a year after judgment had been entered in his favor in the District of Utah, that petitioner first saw fit to attempt to bring his suit into the New York courts and for his counsel to assert his claim to lead counsel status in the New York proceedings.

Reynolds of course by this time had obtained a judgment on his claim in the District of Utah, and it is difficult to see how in those circumstances he could properly intervene in the New York cases. Moreover, he was not within the class as defined in the *Cannon* case, having sold after 10:55 on April 16. His counsel was permitted to appear pursuant to Rule 23(c)(2)(C) on behalf of one of the members of the *Cannon* class who claimed to fall within that class action definition, but lead counsel status was granted to those who had represented the class from the beginning of the New York cases. Of course, any grievance Reynolds may have from denial of those motions can be taken up in the federal courts in New York.

Nevertheless, some response to the attacks on Judge Bonsal should be made. He has been coordinating this complex and difficult litigation for six years. All the substantive matters which counsel for petitioner Reynolds sought to raise by intervening in the New York proceedings had been fully briefed and argued by counsel legitimately appearing in that court. While we do not agree with all of the decisions reached by that court, they were arrived at after full and fair hearing. Judge Bonsal listened patiently to the attacks made by petitioners' counsel upon his rulings on February 10, 1971.

Petitioners also assert that the New York court was in error in limiting the class to pre-10:55 sellers. This again is a problem for the New York courts. But passing that for the moment, there is a substantial difference between those who sold TGS stock prior to the company's release of April 16, 1964, and those who sold after that release was issued, such as Reynolds. Even Judge Ritter stated in his opinion on petitioners' final class motion, that "there can be no question but that there were differences in the kinds and degrees of reliance by the persons to whom the April 12 release was addressed as demonstrated by plaintiffs Reynolds, Mitchell and Stout", all of whom had sold after 10:55 on April 16th. Persons such as Reynolds and Mitchell are in an entirely different position from those who sold during the period *before* the April 16 release. Even if some late sellers may be able to maintain individual actions, it by no means follows that a class action is appropriate. In any event, review of that decision lies elsewhere than by this petition.

II

The courts below correctly refused petitioners' claim for counsel fees.

The District Court refused to award attorneys' fees and the Court of Appeals affirmed, finding no authority for such an award in a private damage suit. That decision was in all respects correct.

Attorneys' fees are recoverable only in certain situations, such as where a statute explicitly so provides (see *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967)), or where a fund has been created for the benefit of a group of persons and it would be inequitable to require the person whose suit created that fund to absorb all of the attorneys' fees, giving the other parties a windfall. (*E.g.*, *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939)). Petitioners' citation of *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964) and *Mills* v. *Electric Autolite Co.*, 396 U.S. 375 (1970) are inapposite here, for those cases are based on the same proposition stated in *Sprague*. Both *Borak* and *Mills* were derivative suits on behalf of corporations, and the corporations which had received the benefits were required to compensate plaintiffs' attorneys for their efforts in conferring those benefits. Where there has been no benefit to the corporation, attorneys' fees are denied in actions under Rule 10b-5. *Saltzman* v. *Technicolor Inc.*, 51 F.R.D. 178, 185 (S.D.N.Y. 1970). The instant case has been of no benefit to Texas Gulf Sulphur Company. Far from creating a fund for Texas Gulf which should be shared with petitioners' attorneys, petitioners, who profited

from their trading in Texas Gulf stock and received speculative profits as damages besides, have caused Texas Gulf and its stockholders to incur substantial expense.

Conclusion

It is respectfully submitted that the courts below were correct in concluding that petitioners should be left to the rights which they sought to pursue on their own behalf in Utah. Reynolds did not go to trial as a champion of the class and his counsel did not, prior to January 1971, seek to coordinate his case with those in the New York courts. Having apparently determined that this individual course was not as economically profitable as desired, petitioners seek to reverse all the decisions they made four and five years ago—indeed decisions which they persuaded the federal courts to then make. The federal judiciary is otherwise attending to the claims of allegedly aggrieved parties, and the relief here sought is both unnecessary and unwise.

Respectfully submitted,

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December 20, 1971

SUPREME COURT, U. S.

FILED

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-693

GEORGE GORDON REYNOLDS AND WALTER A. MITCHELL,
Petitioners,

v.

TEXAS GULF SULPHUR CO. AND CHARLES F. FOGARTY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners George Gordon Reynolds and Walter A. Mitchell reply to the Brief for Respondents in Opposition, advising the Court in particular of events which have transpired subsequent to the filing of the Petition and which underscore the national importance of the matters this case presents.

ARGUMENT

—A—

Respondents urge this Court to ignore the implications of the related New York proceedings, as if a primary function of this Court was not the supervision of a unified federal judiciary, and as if the Petition were not addressed to that very problem. We submit that this Court not only can, but should, resolve such inter-jurisdictional conflicts in the interest of assuring a truly functional federal system. Indeed, section (b) of the Act creating the Multi-District Panel[1] (quoted at Pet. 4) clearly mandates that "the Chief Justice of the United States" *shall* exercise influence in such matters, if there could be any doubt, and while the Southern District of New York is assuredly a respected court Respondents suggestions that it should be the *final* arbiter of either class action or securities law matters is an unwarranted extension of the jurisdiction of the trial court. The parallel New York proceedings are also not matters beyond the record, for they are in evidence in the affidavits of Respondents, who considered them to be proper for consideration by the lower courts when they were urging the dismissal of Reynolds' class allegations but somehow improper now that the dismissal thus solicited is presented for review. Moreover, many of these matters are the subject of published opinions of which this Court may take notice.

—B—

The dilemma presented by the Petition is whether what Respondents agree is now obvious by a process of hindsight,

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[1] Respondents urging that Reynolds was tardy in suggesting use of the Multi-District Panel ignores the fact that the legislation creating the Panel was not adopted until *after* the *Reynolds* case went to trial. We nevertheless submit that its procedures should have been applied to cases then in progress and made that suggestion to the Court of Appeals—which was the only court appropriate for such a suggestion at that time.

could not have been secured through a proper application of Rule 23's procedures as a matter of foresight; or, if the Advisory Committee did not visualize procedures which would have secured these benefits, in all events, without regard for either foresight of hindsight. It is always easy, in lieu of logic, to answer an argument concerning faulty procedures with the hindsight cliché advanced by Respondents, but that is not a solution to the problem. If this dilemma is not resolved by this Court, advanced age may well prove to be the common denominator of all class proceedings, for other defendants in large class action claims will be quick to follow the blueprint for delay of the Respondents herein. Reynolds did, as Respondents have suggested, select the Utah forum in the belief that it could resolve his claim with greater dispatch, but why is not that same consideration of common interest to the entire group of absentees?

–C–

The spectre of confusion flowing from two class actions is a contrived one which will be remedied, not created, if the procedures specified in the Rule are implemented. Furnishing the simple notice affording all absentees the election of participating or "opting out" as specified by the Rule, in lieu of the "Big Brother" approach of Respondents in which that election is already made for them, will result in all class members being quickly aligned with the forum of their choice – and the present confusion and delay in the Southern District of New York will be removed. If the objective be an honest judicial system, what can be so repugnant to giving litigants that simple choice, particularly when the Rule itself was calculated to preserve the individual rights of litigants to the maximum extent consistent with the creation of a streamlined judiciary?

—D—

The crises of judicial inefficiency and delay referred to in the Petition continue unabated and are further compounded by intervening events. As all other events have appeared orchestrated by TGS to undercut these proceedings, the Respondents announced in the New York press on December 31,[2] in apparent response to the Petition seeking relief from judicial inefficiency, that they would seek the compromise of the rights of the uninformed absentees in the New York proceedings — apparently without regard for the views of this Court — at a level approximately 20%[3] of that already adjudicated by Reynolds. We are uninformed as to whether counsel for the New York plaintiffs collaborated in making that proposal, though TGS's public announcement suggested that they did, but counsel for Reynolds have already objected to the proposal[4] and Respondents surely know that any faint-hearted compromise[5] of the absentee's rights will inevitably lead to appeals and additional delays in the New York courts. Neither do we know if the New York court approved of TGS's public announcement, though the announcement itself suggested that it did and the record suggests that the compromise was pro-

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[2] N.Y. Times, Dec. 31, 1971, at 27, col. 1.

[3] The settlement proposal apparently encompasses a mere 364,900 shares of the 691,000 shares which Reynolds claims should be protected, for the announced sum of $2.7 million, or $7.40 per share. We may safely postulate that *all* of the selling shareholders in this group sold at approximately Reynolds price, or less. Thus, calculated at a selling price of $33 per share, and taking the Court of Appeals calculation of damages at the difference between the selling price and $59, together with interest at 6% to the time of judgment, damages under the measure established by Reynolds would be $34.97 per share, or $26.56 in excess of TGS's New York settlement proposal.

[4] The statement at Br. in Op. 14 that counsel for Reynolds did not oppose Respondents motion in the New York proceedings to restrict the class membership is incorrect, for reasons we are confident were unknown to Respondents. On November 16, 1971, counsel for Reynolds